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## The Right to Cable Royalties and the Divisibility of Copyright: Understanding the Interaction

The federal Copyright Act of 1976<sup>1</sup> creates a compulsory licensing system that requires cable operators to pay statutory royalty fees for retransmission of copyrighted programs. The Copyright Royalty Tribunal (CRT) annually distributes these cable royalties to copyright owners.<sup>2</sup> The Copyright Act also recognizes the infinite divisibility of a copyright — thus a copyrighted program may have more than one copyright owner.<sup>3</sup>

The possibility that a copyright might have multiple owners has resulted in disputes between program producers and program syndicators regarding entitlement to cable royalties.<sup>4</sup> In resolving the first such dispute, the D.C. Circuit affirmed a CRT ruling that the syndicator is the proper distributee of cable royalties.<sup>5</sup> The court, however, distinguished the distributee from the owner of the royalties, and held that the contract between the producer and syndicator determines cable royalty ownership.<sup>6</sup> In a subsequent producer-syndicator dispute, the Ninth Circuit interpreted the parties' syndication contract as placing cable royalty ownership in the producer.<sup>7</sup> Because the courts recognized only recently that copyright owners can contractually transfer cable royalties, the number of contract disputes between producers and syndicators is likely to increase.<sup>8</sup>

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1. General Revision of Copyright Law Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1988)) (effective Jan. 1, 1978).

2. 17 U.S.C. §§ 111(d)(4), 801(b)(3) (1988).

3. 17 U.S.C. § 201 (1988).

4. See 1984 Cable Royalty Distribution, 51 Fed. Reg. 8408, 8408 (1987) [hereinafter 1984 Distribution] (final determination).

5. NBC v. Copyright Royalty Tribunal, 848 F.2d 1289, 1293 (D.C. Cir. 1988).

6. *Id.*

7. Barris Indus. v. Worldvision Enters., 875 F.2d 1446, 1451 (9th Cir. 1989).

8. Disputes regarding cable royalty ownership may increase even more rapidly if Congress adopts the Federal Communications Commission's recent proposal to abolish the compulsory license system. See *In re Compulsory Copyright Licenses for Cable Retransmission*, 4 F.C.C. Rec. 6711, 6711 (1989). Because cable licensing royalties will increase under a free market system, see *id.* at 6720, and the incentive for syndicators and producers to litigate their respective right to receive cable royalties should also increase.

Accordingly, a framework for analyzing the parties' respective rights to cable royalties is necessary.<sup>9</sup>

This Note provides such a framework. Part I describes the commercial and cable television industries, cable television's impact on the syndication market, and the copyright protection of commercial television. Part II discusses the courts' approach to resolving cable royalty disputes between producers and syndicators. Part III argues that the D.C. Circuit correctly recognized that the syndication contract determines the copyright owner. This Part, however, further analyzes why the D.C. Circuit's holding is the correct interpretation of the 1976 Copyright Act, and demonstrates that the right to cable royalties is an economic benefit attaching to subdivisions of the distribution and performance rights. Part IV provides a framework for interpreting and drafting syndication contracts that ensures the appropriate party receives the cable royalties. The Note concludes that both the statutory language of the Copyright Act and economic considerations support an interpretation of the compulsory license system that allows producers to transfer the right to cable royalties to syndicators. Moreover, given the economic benefits of such a transfer, courts and practitioners should promote the transfer of cable royalty ownership to syndicators.

## I. THE CABLE CONTROVERSY

### A. THE INDUSTRY

An understanding of cable television's dependence and im-

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9. Numerous commentators have analyzed the compulsory license system, but prior to this Note no commentator has analyzed the right to cable royalties. See Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 COMM/ENT L.J. 477 (1980) (criticizing the compulsory license system and proposing a free market system of retransmission consent); Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y.L. SCH. L. REV. 545 (1977) (explaining the history and provisions of the compulsory license system); Note, *Crossed Signals: Copyright Liability for Resale Carriers of Television Broadcasts*, 16 IND. L. REV. 611 (1983) [hereinafter Note, *Crossed Signals*] (analyzing whether resale carriers who provide cable operators with distant broadcast signals should be subject to copyright liability); Note, *Cable Television's Compulsory License: An Idea Whose Time Has Passed?*, 25 N.Y.L. SCH. L. REV. 925 (1980) [hereinafter Note, *Compulsory License*] (analyzing the criticisms of the compulsory license system and arguing that adoption of a free market system would be premature); Note, *A New Method of Calculating Copyright Liability for Cable Rebroadcasting of Distant Television Signals*, 94 YALE L.J. 1512 (1985) [hereinafter Note, *Copyright Liability*] (criticizing the compulsory license system as subsidizing cable operators and proposing a free market-like system).

pact on the television industry is helpful before undertaking analysis of the respective rights program producers and syndicators have in cable royalties.

## 1. The Commercial Television Industry

The commercial television industry is founded on the distribution of programs to home television viewers.<sup>10</sup> Broadcasters acquire programs, coordinate them into a full broadcast day, and transmit them to home viewers<sup>11</sup> within reach of their broadcast signal.<sup>12</sup> Rather than charging home viewers to receive their broadcast signals, broadcasters sell "audience attention" to advertisers.<sup>13</sup> The projected size of the viewing audience determines the value of the advertising time for a particular program.<sup>14</sup>

Broadcasters receive programs contained in a broadcast day from three main sources.<sup>15</sup> One source of programming is net-

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10. Rules *re* Microwave-Served CATV, 38 F.C.C. 683, 700 (1965). These programs include feature films, series, specials, sports, and news, and may be either live or prerecorded. NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, AN ANALYSIS OF TELEVISION PROGRAM PRODUCTION, ACQUISITION AND DISTRIBUTION 16 (June, 1980) [hereinafter NETWORK INQUIRY] (preliminary report).

11. See 1978 Cable Royalty Distribution, 45 Fed. Reg. 63,026, 63,032 (1980) [hereinafter 1978 Distribution] (final determination) (citing "Memorandum Submitted In Support of the National Association of Broadcasters' Position," at 19).

12. Cf. *Teleprompter Corp. v. CBS*, 415 U.S. 394, 416 (1974) (Douglas, J., dissenting) (stating that "TV waves travel in straight lines, thus reaching a limited area on the earth's curved surface"); Note, *Compulsory License*, *supra* note 9, at 927 (noting that terrain can block television reception).

13. See, e.g., Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 232 (1982); Note, *Crossed Signals*, *supra* note 9, at 614.

14. See Note, *Crossed Signals*, *supra* note 9, at 614; Note, *Compulsory License*, *supra* note 9, at 928; Note, *Copyright Liability*, *supra* note 9, at 1516. The projected audience size depends on numerous factors including the popularity of the program, the program's time slot, and the program's exclusivity. See NETWORK INQUIRY, *supra* note 10, at 379; Note, *Crossed Signals*, *supra* note 9, at 614. The competitive programming on other stations and the number of viewers with access to the broadcast station's signal also affect audience size.

15. See NETWORK INQUIRY, *supra* note 10, at 13. In addition to the three primary sources of programming, broadcast stations also may receive programming from other sources including the Public Broadcasting Service, devotional organizations, and sports. See, e.g., 1986 Cable Royalty Distribution, 54 Fed. Reg. 16,148, 16,149 (1989) [hereinafter 1986 Distribution] (final determination) (listing claimant categories by programming source); see also Rules *re* Microwave-Served CATV, 38 F.C.C. 683, 703 (1965) (listing some programming sources).

works.<sup>16</sup> Networks either produce their own programs or contract with independent program producers for the exclusive right to exhibit their programs.<sup>17</sup> Only broadcast stations affiliated with one of the three commercial networks<sup>18</sup> receive network programming.<sup>19</sup> A second source of programming is programs produced at the broadcast station.<sup>20</sup> Both independent broadcasters<sup>21</sup> and network-affiliated broadcasters engage in some in-house production.<sup>22</sup>

This Note focuses on the third source of programming: syndicators.<sup>23</sup> Syndicators are either independent companies licensed by program producers to distribute their programs to broadcast stations,<sup>24</sup> or separate divisions of program produc-

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16. *Rules re Microwave*, 38 F.C.C. at 703; NETWORK INQUIRY, *supra* note 10, at 13, 116-17; Note, *Compulsory License*, *supra* note 9, at 936.

17. Note, *Compulsory License*, *supra* note 9, at 936. Independent producers range from very small to huge major motion picture companies. NETWORK INQUIRY, *supra* note 10, at 18. Independent producers generally license networks to exhibit their programs for a limited time period with renewal rights. *Id.* at 230-36.

18. American Broadcasting Company (ABC), National Broadcasting Company (NBC), and Columbia Broadcasting System (CBS).

19. See, e.g., Note, *Compulsory License*, *supra* note 9, at 936. Because network affiliated broadcast stations are interconnected electronically, networks can simultaneously transmit their programs to a national audience rather than a distinct set of local audiences. See NETWORK INQUIRY, *supra* note 10, at 13. Accordingly, networks sell program advertising time on a national level rather than a local level. Note, *Copyright Liability*, *supra* note 9, at 1514 n.10. Each affiliated broadcaster receives a percentage of the network advertising revenue based on the size of its viewing audience. Note, *Compulsory License*, *supra* note 9, at 936. Affiliated broadcasters also obtain revenue from local advertising. See *infra* notes 20-22 and accompanying text.

20. NETWORK INQUIRY, *supra* note 10, at 13, 15. These programs usually are limited to local news and public interest programs. *Id.* at 15.

21. Independent broadcasters are defined as broadcasters not affiliated with a network. 17 U.S.C. § 111(f) (1988).

22. NETWORK INQUIRY, *supra* note 10, at 15. In-house produced programs reach only a local audience so broadcasters must depend on local advertisers for revenue.

23. See NETWORK INQUIRY, *supra* note 10, at 13. Syndicators supply both first-run and off-network programming. *Id.* at 14. First-run programs are programs developed specifically for syndicator distribution. *Id.* Off-network programs are programs that originally were, but are no longer, exhibited on a network. *Id.*

24. *Id.* In conventional syndication agreements, the syndicator acts as the producer's agent in exchange for a percentage of the revenue generated through the syndicator's licensing of broadcast stations. *Id.* Some syndication agreements, however, involve an outright sale of the distribution right based on a flat price for each program. See, e.g., 1984 Distribution, *supra* note 4, at 8409 (discussing the outright sale of the "Little House on the Prairie" distribution right). Networks must syndicate their programs through an independent company under an outright sale contract because of an FCC regulation that

tion companies.<sup>25</sup> Independent syndicators often provide program financing to the producers.<sup>26</sup> A syndicator's primary responsibility, however, is to solicit exhibition license agreements from broadcast stations and then supply the licensed stations with a tape of the syndicated programs.<sup>27</sup> Syndicators primarily distribute programming to independent broadcast stations.<sup>28</sup>

A syndicator's revenue depends on how many broadcast stations she can license and how much each broadcast station will pay for the right to exhibit her programs.<sup>29</sup> These factors in turn depend on the potential revenue broadcast stations could generate by selling advertising time on each syndicated program.<sup>30</sup> Because independent broadcast station signals reach only a local audience,<sup>31</sup> syndicated programs attract only local advertisers.<sup>32</sup>

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prohibits networks from engaging in the syndication process. 47 C.F.R. § 73.658(j)(i) (1988). This regulation provides that no television network shall sell, license, or distribute television programs to television station licensees within the United States for non-network television exhibition or otherwise engage in the business commonly known as "syndication" within the United States; . . . or reserve any option or right to share in revenues or profits in connection with such domestic . . . sale, license, or distribution.

*Id.*; see also NETWORK INQUIRY, *supra* note 10, at 335-39 (analyzing the economic effect of this regulation).

25. NETWORK INQUIRY, *supra* note 10, at 14.

26. See *id.* at 122-24, 128-30 (discussing the role of advance financing of off-network and first-run programs by syndicators).

27. *Id.* at 14. Off-network programs also are supplied to the station on tapes. In contrast to first-run programs, the station retains the tape for the term of the license agreement or until the authorized runs are completed. *Id.*

28. Because independent broadcasters do not receive programming from the networks, they must rely on syndicators to supply their programming. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, NETWORK BROADCASTING, H.R. REP. NO. 1297, 85th Cong., 2d Sess. 47-48 (1958) [hereinafter NETWORK BROADCASTING]; NETWORK INQUIRY, *supra* note 10, at 116-18. Network-affiliated broadcasters also receive some programming from syndicators because the networks do not supply sufficient programming to fill an entire broadcast day. NETWORK BROADCASTING, *supra*, at 47.

29. See *supra* note 24.

30. See, e.g., Note, *Crossed Signals*, *supra* note 9, at 614. The more an advertiser will pay to advertise on the program, the more the broadcaster will pay for the right to exhibit the program. *Id.* In contrast, if the program will generate very little advertising revenue, the broadcaster may not enter an exhibition licensing agreement at all. To increase the attractiveness of syndicated programs to advertisers, broadcasters may contract for the exclusive exhibition right in their local market. See, e.g., Note, *Compulsory License*, *supra* note 9, at 936.

31. See *supra* note 12 and accompanying text.

32. See, e.g., Note, *Copyright Liability*, *supra* note 9, at 1516 & n.22; see

## 2. The Cable Television Industry<sup>33</sup>

Cable companies receive the signals of broadcast stations through antennae, by microwave, or by satellite, and simultaneously retransmit<sup>34</sup> those signals without alteration<sup>35</sup> through a network of cables to the viewing audience.<sup>36</sup> Because television viewers have free access to local independent and network programming, cable operators primarily retransmit the signals of distant, independent broadcasters.<sup>37</sup> Viewers compensate cable operators for the increased diversity of programming by paying monthly subscription fees.<sup>38</sup>

### B. THE CABLE-COMMERCIAL TELEVISION CONTROVERSY AND THE COPYRIGHT ACT OF 1976

The birth and growth of cable competition economically injured the commercial television industry by drawing viewers

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*also Note, Crossed Signals, supra* note 9, at 615 (noting that "advertisers in the broadcaster's local market may not value [a] nationwide audience as potential customers"). There are two exceptions to having only local advertising on independent broadcast stations. One exception is national "spot" advertising, whereby national advertisers buy time in selected market areas because of a concentrated sales effort, lack of a network affiliate in the market, or a desire for more flexibility than a network provides. NETWORK BROADCASTING, *supra* note 28, at 49. The second exception is independent "super stations" such as WTBS, which are widely retransmitted by cable, and therefore are able to market their programs to national advertisers. See Brotman, *supra* note 9, at 482.

33. Cable television commonly is referred to as CATV, an acronym for community antenna television. Meyer, *supra* note 9, at 545 n.1. Early CATV systems used master antennae to bring local broadcast signals into homes that had difficulty receiving the conventional signal because of the terrain. Brotman, *supra* note 9, at 478.

34. Simultaneous retransmission is required by law. 17 U.S.C. § 111(e) (1988). However, "under special and limited exceptions, applicable only to off-shore contiguous states, the taping of a program and the transmission of the tape is considered a secondary transmission." Meyer, *supra* note 9, at 551 (discussing the effect of 17 U.S.C. § 111(e)-(f)).

35. Section 111(c)(3) prohibits cable operators from altering the signal they receive. 17 U.S.C. § 111(c)(3) (1988). Thus, cable operators cannot generate revenue through the sale of advertising time.

36. Meyer, *supra* note 9, at 545 n.1.

37. Note, *Crossed Signals, supra* note 9, at 613 n.18; Note, *Copyright Liability, supra* note 9, at 1514 n.10.

38. See 17 U.S.C. § 111(f) (1988) (defining "cable system"); HOUSE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. NO. 1476, 94th Cong., 2d Sess. 88 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5702-03 [hereinafter HOUSE REPORT]; Rivkin, *The Changing Signals of Cable T.V.*, 60 GEO. L.J. 1475, 1480 (1972); Note, *Crossed Signals, supra* note 9, at 613 n.18.

away from commercial television.<sup>39</sup> Accordingly, the television industry sought government protection from cable competition. The industry complained that cable operators intercepted broadcast signals and retransmitted them to subscribers without paying royalties for the commercial use of the copyrighted programs contained in the signals.<sup>40</sup> Before the 1976 Copyright Act, however, the commercial television industry did not have copyright protection from these unauthorized retransmissions.<sup>41</sup> The industry's only recourse was to the Federal Communications Commission (FCC), which enacted extensive regulations limiting the competitive threat of cable.<sup>42</sup> With the

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39. See, e.g., Note, *Copyright Liability*, *supra* note 9, at 1516.

40. See, e.g., Brotman, *supra* note 9, at 478; Meyer, *supra* note 9, at 546. In contrast, commercial broadcast stations must pay copyright royalties. See Brotman, *supra* note 9, at 478.

41. The broadcasters initially challenged cable retransmissions as unfair competition. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, 349 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965); see also Note, *Compulsory License*, *supra* note 9, at 929 (discussing the broadcasters' claim). The Ninth Circuit rejected this claim, stating that "[s]ave for the limited protection accorded the creator of . . . works . . . anyone may freely . . . avail himself of such works . . . subject only to the qualification that he does not steal good will, or, perhaps more accurately stated, deceive others in thinking the creations represent his own work." *Cable Vision*, 335 F.2d at 351. The Ninth Circuit advised that any challenge to cable retransmission of copyrighted programs should be made either by or in conjunction with the copyright owners under copyright law. *Id.* at 353.

The television industry, however, soon discovered that existing copyright law did not protect them from unauthorized cable retransmission of copyrighted programs. In an infringement action brought under the Copyright Act of 1909, copyright owners claimed that cable retransmission of copyrighted programs constituted a public performance without authorization and therefore violated sections 1(c) and (d) of the Act. *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 394-95 (1968). Section 1(c) granted copyright owners the exclusive right to perform nondramatic literary works in public for profit, and section 1(d) granted owners the exclusive right to perform dramatic works publicly. *Id.* at 395. The Supreme Court rejected this argument, holding that cable retransmission did not constitute a public performance. *Id.* at 400-01; see also *Teleprompter Corp. v. CBS*, 415 U.S. 394, 408-09 (1974) (affirming and expanding the *Fortnightly* holding to provide that importation of distant signals by cable companies into markets that otherwise could not be reached by the broadcaster's signal is not a copyright infringement). Rather, the Court in *Fortnightly* found that cable was a passive system that did no more than enhance the television viewer's capacity to receive the broadcaster's signal, which already had been released to the public at large. *Fortnightly*, 392 U.S. at 399-400; see also *Teleprompter*, 415 U.S. at 408 (adopting the *Fortnightly* reasoning). The Court further stated that it took the Copyright Act of 1909 as it found it. *Fortnightly*, 392 U.S. at 401-02. A compromise decision to accommodate "the competing considerations of copyright, communications, and anti-trust" was a job for Congress. *Id.* at 401.

42. Extensive FCC regulations, including a requirement that cable opera-



1976 Copyright Act, however, Congress finally reached a statutory solution to the controversy between commercial and cable television.<sup>43</sup>

Section 106 of the 1976 Copyright Act sets out five exclusive rights accruing to a copyright owner.<sup>44</sup> These rights include an exclusive distribution right<sup>45</sup> and an exclusive performance right.<sup>46</sup> As defined, "performance" includes the retransmission of broadcast signals by cable operators to subscribers.<sup>47</sup> The exclusive rights allow the copyright owner to exploit economically the copyrighted work.

The copyright owner's rights, however, are not absolute.

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tors receive retransmission consent from the originating broadcast station, resulted in a virtual "freeze" on cable operation. Note, *Compulsory License*, *supra* note 9, at 932-33. Because broadcasters viewed cable as competition, they refused to sanction retransmission of their signals by cable. *Id.* at 933. These harsh FCC regulations forced cable operators into negotiations with the commercial television players. *Id.* at 934. In the resulting compromise, Cable Television Report and Order, 36 F.C.C.2d 143 (1972) (commonly known as the "Consensus Agreement"), cable operators agreed to support proposed copyright legislation requiring cable operators to pay copyright royalties. See Note, *Compulsory License*, *supra* note 9, at 934. In exchange, the FCC agreed to allow limited growth of the cable industry. *Id.* The FCC, however, provided additional protection to the commercial television industry by limiting the number of distant broadcast signals cable operators could import, *id.* at 934-35, and by requiring cable operators to delete programs from signals imported into major markets on the request of local broadcasters who had purchased exclusive rights to the programs. *Id.* at 935-36. This compromise was the catalyst to finally reaching a workable statutory solution to the cable-copyright problem.

43. 17 U.S.C. § 111 (1988); see also Note, *Compulsory License*, *supra* note 9, at 937-40 (discussing the history of the 1976 Copyright Act). The 1976 Copyright Act represents a compromise between the commercial television industry and cable operators. See *id.*

44. 17 U.S.C. § 106 (1988). Section 106 provides that

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;  
 (2) to prepare derivative works based upon the copyrighted work;  
 (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

*Id.*

45. *Id.* § 106(3).

46. *Id.* § 106(4).

47. HOUSE REPORT, *supra* note 38, at 63.

Sections 107 through 118 of the 1976 Copyright Act impose various limitations and qualifications on the rights granted in Section 106.<sup>48</sup> One of these, section 111, was the long-awaited solution to the cable-copyright controversy: a compulsory licensing system.<sup>49</sup> Subject to specified statutory requirements, section 111 gives each cable operator the right to retransmit all broadcast signals allowed by FCC regulations.<sup>50</sup> If a cable operator fails to comply with any statutory or regulatory requirements, its retransmission of broadcast signals constitutes a copyright infringement.<sup>51</sup>

In exchange for the right to retransmit the copyrighted programs contained in broadcast signals, cable operators must make prescribed royalty payments to the Register of Copyrights.<sup>52</sup> The royalty payments are based on a percentage of the gross receipts a cable operator receives from subscriptions to the basic cable service of retransmitted broadcast signals.<sup>53</sup> The number of distant broadcast signals the cable operator retransmits determines the appropriate percentage.<sup>54</sup> Accordingly, cable royalties increase when cable companies increase either their gross receipts or the number of distant signals they carry.

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48. *Id.* at 61.

49. 17 U.S.C. § 111 (1988). Congress adopted a compulsory licensing system rather than an alternative solution because it feared that market negotiation for retransmission rights would result in a freeze on cable operation, as previously had occurred, or would be prohibitively expensive. *In re Compulsory Copyright License for Cable Retransmission*, 4 F.C.C. Rec. 6711, 6712 (1989).

50. 17 U.S.C. § 111 (1988); HOUSE REPORT, *supra* note 38, at 93.

51. 17 U.S.C. § 111(c)(2)-(3) (1988). At the time the Act was passed, relevant FCC regulations included a limitation on importation of distant broadcasting signals and the syndicated exclusivity rule. *See supra* note 42. Both regulations were later repealed. *Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663 (1980), *aff. sub nom. Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). The FCC, however, reinstated the syndicated exclusivity rule. *Cable Television Services: Program Exclusivity in the Cable and Broadcast Industry*, 53 Fed. Reg. 27,167 (1988).

52. 17 U.S.C. § 111(d)(1) (1988).

53. *Id.* § 111(d)(1)(B). As defined, "gross receipts" excludes revenues from cable installation, movie channels, and all other non-basic services. HOUSE REPORT, *supra* note 38, at 96.

54. 17 U.S.C. § 111(d)(1)(B)(i)-(iv), (f) (1988). Only distant signals are relevant to royalty fee calculation because cable retransmission of local signals does not injure the copyright owner of programs contained in the signals. Local advertisers compensate the original broadcaster for the audience reached by cable retransmission of programs into the original market. Local advertisers, however, will not pay for the audience reached by cable retransmission in a distant market. *See supra* notes 14, 30-32 and accompanying text. Thus, statutory cable royalties need only compensate copyright owners for cable's use of

### C. THE COPYRIGHT ROYALTY TRIBUNAL

The Copyright Royalty Tribunal (CRT) administers the compulsory licensing system.<sup>55</sup> The CRT is charged with two functions. First, the CRT periodically reviews and, if necessary, adjusts the statutory royalty fee rate.<sup>56</sup> The CRT also annually distributes the cable royalties to copyright owner claimants.<sup>57</sup>

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their programs in distant markets. *See Note, Copyright Liability, supra* note 9, at 1514 n.10.

In calculating the number of distant signals a cable operator retransmits, the Copyright Act draws a distinction between retransmission of network-affiliated broadcasters' signals and independent broadcasters' signals. 17 U.S.C. § 111(f) (1988). Retransmission of an independent signal counts as one "distant signal equivalent" whereas retransmission of a network signal counts as one-quarter of a "distant signal equivalent." *Id.* The reason for this distinction is that the majority of an affiliated broadcaster's programming contains national advertising. Because national advertisers value the audience reached by cable retransmission, the copyright owners of network programming are not injured by cable retransmissions. *See, e.g., HOUSE REPORT, supra* note 38, at 90; Meyer, *supra* note 9, at 559 n.63; Note, *Compulsory License, supra* note 9, at 941; *see also supra* note 19 (discussing why network programs reach a national audience). The one-quarter "distant signal equivalent" represents the approximate portion of each network affiliate broadcast day that contains locally transmitted syndicated programs. In contrast, independent broadcaster signals primarily contain syndicated programming with local advertising that does not benefit from cable retransmission. *See supra* note 32 and accompanying text.

55. 17 U.S.C. §§ 111(d)(5), 801, 804 (1988); *see also* Meyer, *supra* note 9, at 565-69 (discussing the role of the CRT).

56. 17 U.S.C. § 801(b) (1988). The CRT can adjust royalty rates to reflect inflation, deflation, changes in the average rates charged cable subscribers, and changes in FCC regulations. *Id.* § 801(b)(2); *see also* Meyer, *supra* note 9, at 565-68 (discussing the CRT's ability to adjust the royalty rates).

57. 17 U.S.C. § 111(d)(4) (1988). Because each individual program retransmitted by cable has one or more copyright owners, the number of copyright claimants coming before the CRT is potentially unlimited. *See infra* text accompanying notes 64-66 (discussing the divisibility of a copyright). To simplify and facilitate the annual distribution, the CRT has established a two phase process. *E.g., 1978 Distribution, supra* note 11, at 63,027.

In the first phase, the CRT divides the royalty fund on a percentage basis among groups of copyright owner claimants. *E.g., id.* Each Phase I group consists of claimants representing a general source of retransmitted programs. *See supra* note 15 and accompanying text (discussing program sources). For example, one group, currently known as the "program suppliers," consists of all the copyright owners of retransmitted syndicated programs. *See, e.g., 1986 Distribution, supra* note 15, at 16,149-50. The program supplier group consistently has received the majority of the cable royalty fees, averaging approximately 70% per year. *See, e.g., 1979 Cable Royalty Distribution, 47 Fed. Reg. 9879, 9897 (1982) [hereinafter 1979 Distribution] (final determination).*

Another group consists of all broadcasters claiming royalty entitlement for retransmitted station-produced programs. *See 1983 Cable Royalty Distribution, 51 Fed. Reg. 12,792, 13,811 (1986) [hereinafter 1983 Distribution] (final determination).* Today, this group is called "commercial television." *Cf. 1986*

If the claimants privately agree to the royalty allocations, the

Distribution, *supra* note 15, at 16,149 (noting that the commercial television category consists of the National Association of Broadcasters (NAB)).

In 1978, there were six Phase I groups. *See* National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 372 (D.C. Cir. 1982) (*NAB I*), *cert. denied*, 475 U.S. 1035 (1986). The six groups were program syndicators and movie producers, sports leagues, television broadcasters, public television, music claimants, and radio claimants. *Id.* Today, there are nine Phase I groups. *See, e.g.*, 1986 Distribution, *supra* note 15, at 16,155. The nine groups are program suppliers, joint sports, commercial television, public broadcasting service, music, devotional claimants, Canadian claimants, commercial radio, and National Public Radio. *Id.* The 1983 groups are virtually the same as the 1978 groups with only a name change. The three additional Phase I categories result from subdivisions of 1978 Phase I groups splitting off and forming their own Phase I groups. For example, the devotional claimants initially were included in the program syndicators and movie producers group. *See* 1980 Cable Royalty Distribution, 47 Fed. Reg. 24,768, 24,768 (1982) (notice). The Canadian claimants, who represent the copyright owners of both Canadian television and radio programs retransmitted by cable operators in the U.S., respectively, were included in the 1978 television broadcasters and radio groups. *NAB I*, 675 F.2d at 372. Lastly, commercial radio and National Public Radio were included in the 1978 radio group. *Id.* at 373. In each distribution year, at least one Phase I group has not qualified for any cable royalties. *E.g.*, 1983 Distribution, *supra*, at 12,812 (noting that commercial radio has consistently failed to show entitlement to a quantifiable award).

In Phase II of the distribution process, the CRT allocates the royalties among the claimants within each of the Phase I groups. *See, e.g.*, 1978 Distribution, *supra* note 11, at 63,027. For example, if the Phase I devotional claimants group received 5% of the royalty fund, in Phase II the CRT would divide the 5% on a percentage basis between all the claimants within the devotional claimants group. Once the allocations are completed, a particular devotional claimant may have 25% of the 5% devotional claimants Phase I allocation or, in other words, 1.25% of the total royalty fund. Phase II allocations are necessary only if a dispute arises between the claimants within a Phase I group. *See, e.g., id.*

Claimants within a Phase I group may be individual copyright owners, each with rights to one or more programs retransmitted by cable. For example, the devotional claimants Phase I group includes the Christian Broadcasting Network, PTL Television Network, and Old Time Gospel Hour, each representing only their own interests. *E.g.*, 1980 Cable Royalty Distribution, 48 Fed. Reg. 9,552, 9,561 (1983) [hereinafter 1980 Distribution] (final determination). On the other hand, Phase I groups may contain associations representing a group of individual copyright owners. *See* 17 U.S.C. § 111(d)(4)(A) (1988) (allowing copyright claimants to "lump their claims together and file them jointly or as a single claim, or . . . designate a common agent to receive payment on their behalf"). Because most claimants exercise the right to bring joint claims, Phase I groups usually consist of a limited number of associations. For example, the major claimant in the syndicated program supplier group is the Motion Picture Association of America. *See, e.g.*, 1986 Distribution, *supra* note 15, at 16,149. In the 1986 distribution proceedings, the MPAA represented 99 producers and syndicators claiming cable royalties for 6,299 different syndicated series, movies, and specials. *Id.*

The commercial television Phase I group consists of only the National As-

CRT simply distributes the funds according to their agreement.<sup>58</sup> If the parties cannot reach a settlement, the CRT conducts evidentiary hearings to determine the proper allocation of the royalties.<sup>59</sup> Claimants dissatisfied with the CRT's allocation may appeal the CRT's decision to a federal appellate court.<sup>60</sup>

Given the large size of the cable royalty fund,<sup>61</sup> it is not surprising that the CRT has had to resolve numerous disputes

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sociation of Broadcasters. *See id.* at 16,149. When a Phase I group consists of only one claimant, the CRT need not make a Phase II allocation.

When an agency or association represents copyright owners before the CRT, the copyright owners must privately negotiate further allocation of the cable royalties. Further allocation by private negotiation follows from the fact that the CRT has never faced a dispute between individual copyright owners represented by the same association. *See, e.g.*, 1985 Cable Royalty Distribution, 53 Fed. Reg. 7132, 7132 (1988) [hereinafter 1985 Distribution] (final determination). For example, the MPAA must determine how much of the cable royalties the copyright owner of Little House on the Prairie and the copyright owner of Hogan's Heroes should each receive. This type of dispute should be distinguished from a dispute over who is the relevant copyright owner of Little House on the Prairie, a dispute that did arise in the 1984 and 1985 distribution proceedings. *See* 1984 Distribution, *supra* note 4, at 8408; 1985 Distribution, *supra*, at 7132; *see also infra* notes 72-82 and accompanying text (discussing these disputes).

58. 17 U.S.C. § 111(d)(4)(A) (1988) (providing that "any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them"). Claimants are free to settle at both the Phase I and Phase II distribution levels. If the claimants settle as to only a portion of the funds, the CRT has the discretion to distribute the portion of the funds not in controversy while withholding an amount sufficient to satisfy all claims in controversy. 17 U.S.C. § 111(d)(4)(C) (1988).

59. 17 U.S.C. § 111(d)(4)(B) (1988). The primary factors guiding CRT royalty allocation are

- (a) the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems,
- (b) the benefit derived by cable systems from the secondary transmission of certain copyrighted works, and
- (c) the marketplace value of the works transmitted.

*E.g.*, 1978 Distribution, *supra* note 11, at 63,035. The secondary factors are: 1) the quality of copyrighted program material; and 2) the amount of cable retransmission time allocated to the programs. *E.g., id.* The CRT's goal is to simulate market valuation of the retransmitted programs. *Id.* at 63,036. Evidence of market valuation introduced by the claimants includes the Nielsen Study, which measures the number of hours of distant signal programming viewed by cable households; attitudinal surveys, which measure the value cable operators place on certain kinds of programming; and testimonials. *E.g.*, 1983 Distribution, *supra* note 57, at 12,803. The CRT consistently has given most weight to the Nielsen Study introduced by the MPAA. *Id.*

60. 17 U.S.C. § 810 (1988).

61. Each year the size of the cable royalty fund has increased:

over the proper allocation of cable royalties.<sup>62</sup> In resolving

<u>Year of Collection</u>	<u>Size of Cable Fund</u>
1978	\$ 17,717,000 <sup>a</sup>
1979	23,732,000
1980	28,052,000
1981	35,559,000
1982	44,375,000
1983	84,317,000 <sup>b</sup>
1984	100,465,000
1985	113,264,000
1986	119,025,507 <sup>c</sup>
1987	155,454,004
1988	91,810,554 <sup>d</sup>

<sup>a</sup>Years 1978-85 represent total collections plus accrued interest.

<sup>b</sup>Years 1984-88 include the basic, 3.75, and syndicated exclusivity funds. The latter two were created after a change in FCC regulations.

<sup>c</sup>Years 1986-88 represent only collections with no accrued interest.

<sup>d</sup>Collections for first six month accounting period only.

*In re Compulsory Copyright License for Cable Retransmission*, 4 F.C.C. Rec. 6711, 6716 (1989).

62. The royalty claimants appealed one or more of the disputes arising in the CRT hearing to a federal appellate court in the distribution years 1978, 1979, 1980, 1982, 1983, and 1984. *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 809 F.2d 172, 174, 176 (2d Cir.) (*NAB III*), *cert. denied*, 475 U.S. 1035 (1986). Since the first three annual CRT distributions, however, the number of disputes have decreased. Claimants appealed six different disputes in the 1978 and 1979 CRT distribution proceedings. *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 372 (D.C. Cir. 1982) (*NAB I*) (1978 appeal), *cert. denied*, 475 U.S. 1035 (1986); *Christian Broadcasting Network v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1301-02 (D.C. Cir. 1983) (1979 appeal), *cert. denied*, 475 U.S. 1035 (1986). In contrast, only three disputes arose in the 1984 and 1985 CRT distribution proceedings. 1984 Distribution, *supra* note 4, at 8408; 1985 Distribution, *supra* note 57, at 7132. In the 1986 distribution proceeding, there was only one dispute. 1986 Distribution, *supra* note 15, at 16,149. Reduction of the number of disputes has occurred primarily at the Phase I level. In 1981, 1984, 1985, and 1986, the claimants settled on the Phase I allocations. 1983 Distribution, *supra* note 57, at 12,792 (1981 settlement); 1986 Distribution, *supra* note 15, at 16,149 (1984-86 settlements).

One reason for this decrease is that the CRT adopted a policy of incorporating prior years' records into the distribution proceedings and changing prior years' allocation percentages only upon a showing of changed circumstances or that the previous allocation was faulty. *See National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 932 (D.C. Cir. 1985) (*NAB II*), *cert. denied*, 475 U.S. 1035 (1986); 1983 Distribution, *supra* note 57, at 12,792. The second reason the number of disputes decreased is the standard of appellate review mandated by the Administrative Procedure Act. 5 U.S.C. § 706 (1988). On review, federal courts will uphold the CRT's allocations unless they are arbitrary or capricious, and not supported by substantial evidence. *E.g.*, *NAB I*, 675 F.2d at 371. Beginning with the appeal of the CRT's second royalty distri-

these disputes, the CRT also has had to decide preliminary issues. One such issue is determining which claimant, when more than one is seeking cable royalties for the same retransmitted program, is entitled to the royalties.<sup>63</sup>

bution, the appellate courts have been adamant about the deference given to the CRT's findings. See *Christian Broadcasting*, 720 F.2d at 1319 (stating that "in many respects, we find challenges to the Tribunal's 1979 Decision to reflect little more than the boundless litigiousness of disappointed claimants"); *NAB II*, 772 F.2d at 940 (stating that "[w]e will not hesitate henceforth, should this tack of litigation-to-the-hilt continue to characterize the aftermath of CRT distribution decisions, to refrain from elaborately responding to the myriad of claims and contentions advanced by a highly litigious copyright-owner subculture"); *NAB III*, 809 F.2d at 183 (citing *NAB II*, 772 F.2d at 940). Due to these two factors, most claimants probably recognize that re-litigating their differences is futile.

Some claimants, however, have persisted in challenging the CRT's distribution. For example, in every year but 1978 and 1981, Multimedia has sought to increase its allocation of the Phase I program suppliers award at the expense of the MPAA. See 1986 Distribution, *supra* note 15, at 16,149.

63. See 1984 Distribution, *supra* note 4, at 8408; 1985 Distribution, *supra* note 57, at 7132. Additional disputes that may arise in the distribution process include 1) whether a cable system retransmitted the copyrighted program; 2) whether the claimant's copyrighted material is compensable; and 3) whether the retransmitted program is in the public domain.

Because of the minimal filing requirements necessary for cable royalty entitlement (claimants need only identify a single cable retransmission of the program), 37 C.F.R. § 302.7(b)(4) (1989), the first type of dispute has arisen only once. In the 1979 distribution proceeding, Multimedia, the National Association of Broadcasters, and others, challenged a number of claims made by the MPAA as not meeting the CRT's filing requirements. 1979 Distribution, *supra* note 57, at 9895. The CRT ruled that the evidence of program retransmission introduced by the MPAA was sufficient. *Id.* The D.C. Circuit affirmed the CRT's decision. *Christian Broadcasting*, 720 F.2d at 1313.

The second type of dispute, which has arisen twice, focuses on the definition of "work" as contained in § 111(d)(4) of the 1976 Copyright Act. 17 U.S.C. § 111(d)(3) (1988). This section requires the CRT to distribute cable royalties to copyright owners whose work was included in a secondary transmission. *Id.* The CRT and reviewing courts have interpreted "work" to mean programs and the music contained in those programs. See, e.g., 1978 Distribution, *supra* note 11, at 63,037, 63,040. The CRT has found that "work" does not include the individual components of a program, *id.* at 63,033 (denying the copyright owners of cartoon characters compensation for the retransmission of their characters), or the "broadcast day as a compilation." *Id.* at 63,038. The CRT distinguished cartoon characters from the music in programs on the basis of contractual relationships and legislative intent. *Id.* at 63,033-34.

The third type of dispute, whether a claimant's program has entered the public domain, also has arisen twice. *NAB II*, 772 F.2d at 936; *Christian Broadcasting*, 720 F.2d at 1313. In each challenge, numerous copyright owners claimed that some of the programs for which the MPAA was seeking cable royalties had entered the public domain. The D.C. Circuit rejected the first challenge because sufficient evidence existed to find that the royalties went to bona fide copyright owners. *Christian Broadcasting*, 720 F.2d at 1313. In the second challenge, the D.C. Circuit upheld the CRT's finding that although the

The statutory catalyst for disputes regarding entitlement to a program's cable royalties is section 201(d) of the 1976 Copyright Act.<sup>64</sup> Section 201(d) provides that:

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . .

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.<sup>65</sup>

This provision enables a copyright owner to transfer one or more of the five exclusive rights, a subdivision of one or more of the exclusive rights, or any combination of the two. A program thus may have more than one copyright owner, each owning different rights in the copyright. The entitlement problem arises because Congress directed the CRT to distribute cable royalties to "copyright owners who claim that their works were the subject of secondary transmissions by cable systems."<sup>66</sup> Congress gave no further direction.

Whether the current compulsory license system is maintained or a free market system is adopted,<sup>67</sup> multiple copyright

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programs brought to their attention were actually in the public domain, these programs were "such a small percentage of the total programming claimed by MPAA as to be *de minimis*." *NAB II*, 772 F.2d at 936. Accordingly, the MPAA's royalty allocation was not affected. *Id.* The court, however, expressed concern that the CRT's procedures did not provide a basis for challenging copyright ownership in a particular program. *Id.* at 936-37. Specifically, the court found that claimants have no way of knowing what programs are being claimed by opposing copyright owners. *Id.* at 937. Rather, the CRT requires a claimant to list only one program retransmitted by cable to which the claimant owns the copyright. *Id.* The court urged the CRT to establish "a sensible way in which a good-faith examination of and challenge to copyright ownership" could be made. *Id.*

64. 17 U.S.C. § 201(d) (1988).

65. *Id.*

66. 17 U.S.C. § 111(d)(3) (1988).

67. Although the CRT has accomplished some degree of administrative efficiency and has attempted to simulate a free market in both the rate adjustment and distribution process, *In re Compulsory Copyright License for Cable Retransmission*, 4 F.C.C. Rec. 6711, 6717 (1989), commentators frequently have criticized the compulsory licensing system for not functioning as a free market. *Id.* at 6712; Note, *Compulsory License*, *supra* note 9, at 945-47. The basis for this criticism is that copyright owners are unable to determine and respond to actual public demand for their programs because the compulsory license fees do not accurately reflect the market rate for programs. *In re Compulsory Copyright License*, 4 F.C.C. Rec. at 6712. In August, 1989, the FCC recommended abolishing the compulsory licensing system and adopting a system of full copyright liability for cable retransmission without the copyright owner's



owners will continue to disagree about their respective rights to a program's cable royalties.<sup>68</sup> To date, such disputes have arisen between three different sets of litigants: 1) sports teams and broadcasters,<sup>69</sup> 2) broadcasters and program suppliers;<sup>70</sup>

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permission. *Id.* at 6711. If Congress adopts this proposal, the CRT will no longer allocate cable royalties. Other disputes the CRT has faced, however, may arise before federal and state courts. See disputes discussed *supra* note 63 and accompanying text.

68. If Congress maintains the compulsory license system, disputes will arise regarding who is entitled to statutory cable royalties. If Congress adopts a free market system, disputes will arise about who is entitled to license cable retransmission and thereby receive cable licensing revenue. See *infra* notes 129-31.

69. The dispute between sports teams and broadcasters involved the right to cable royalties for retransmitted sports programs. *E.g.*, National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 377-78 (D.C. Cir. 1982) (*NAB I*), *cert. denied*, 475 U.S. 1035 (1986). The broadcasters based their claim to royalties on two theories: 1) by producing and recording the sporting events, they are either the sole or co-owner of the original copyrights; or 2) although sports teams may be the original copyright owners of the sporting events, by granting broadcast stations the exclusive exhibition rights, the teams contractually transfer the right to cable royalties to the broadcast stations. *Id.* I will discuss each of these theories separately and then will discuss their interaction.

The broadcasters' first theory of recovery consistently has been unsuccessful. In the 1978 distribution proceeding, the CRT denied the broadcasters any original ownership right in the sports programs. 1978 Distribution, *supra* note 11, at 63,039. On appeal, the D.C. Circuit overturned the CRT's finding, holding that "Congress clearly seemed to contemplate Tribunal recognition of the copyrightable interests claimed by [the broadcasters]." *NAB I*, 675 F.2d at 378. The court, however, found that the copyright interest of the broadcasters was quantitatively de minimis. *Id.* at 379. Accordingly, the court upheld the CRT's total distribution to the commercial broadcasters of 3.25% of the royalty fund. *Id.* This amount included allocations for the broadcasters' station produced programming, but did not include any allocation for the retransmission of sports programs. 1978 Distribution, *supra* note 11, at 63,038-39. In subsequent distributions, the CRT has continued to find that the broadcasters original copyright contribution to sports programs is minimal. 1980 Distribution, *supra* note 57, at 9565.

As to the broadcasters' second theory of recovery, the CRT has recognized that a sports team may contractually transfer its right to cable royalties to a broadcaster. *E.g.*, 1978 Distribution, *supra* note 11, at 63,039. In the 1979 CRT distribution proceeding, the CRT stated that "cable royalties for sports programming shall be awarded to the sports claimants except when contractual arrangements specifically provide that such royalties should be distributed to broadcaster claimants." 1979 Distribution, *supra* note 57, at 9893.

On remand of the 1979 distribution dispute, the CRT accepted a joint proposal from the broadcasters and sports interests that the entire Phase I distribution of cable royalties for sports telecasts will go to the sports claimants and "[a]ny subsequent sharing of royalties between these sports interests and broadcasters will be left to their private resolution." 1979 Cable Royalty Distribution, 49 Fed. Reg. 3899, 3899 (1984) (remanded issues). This proposal blurred the distinction between a claim based on original copyright ownership

and 3) program producers and syndicators. Because of the com-

and a claim based on the contractual transfer of the right to cable royalties, because both claims were merged into the private allocation process. The broadcasters soon became dissatisfied with this private allocation procedure. In the 1980 CRT distribution proceeding, the broadcasters again went before the CRT asking for a valuation of their original copyright interest in the sports programming. 1980 Distribution, *supra* note 57, at 9556. The reason for the broadcasters' request was that the CRT's findings as to the value of the broadcasters' original copyright interest had a direct effect on the broadcasters' bargaining power with the sports teams. *Id.* As stated above, the CRT found this original interest to be minimal. *Id.* at 9565. Thus, the broadcasters possess little bargaining power.

70. The first dispute between broadcasters and program suppliers, including both syndicators and producers, arose in the 1978 CRT distribution proceeding. *See* 1978 Distribution, *supra* note 11, at 63,032. The broadcasters argued that because they held exclusive exhibition licenses, they were entitled to all of the rights, remedies, and protection provided by the 1976 Copyright Act, including the right to receive compulsory royalty fees. *Id.* The CRT rejected this argument holding that distribution of cable royalties to broadcasters would violate the congressional intent to compensate broadcasters only for locally produced programs. *Id.* On appeal, the D.C. Circuit upheld the CRT's refusal to compensate broadcasters as exclusive licensees. *NAB I*, 675 F.2d at 379 n.21. The court, however, did not base its ruling on congressional intent. Rather, the court denied the broadcasters' claim because they had an alternative means of protecting their exclusivity rights. *Id.* The broadcasters could force cable operators to delete certain syndicated programming from distant signals under the FCC's exclusivity rules. *Id.*

Following this holding, the broadcasters did not renew their claim to cable royalty entitlement until the 1983 distribution proceedings. 1983 Distribution, *supra* note 57, at 12,806. The reason for renewing their claim in this proceeding was that the FCC had repealed the syndicated exclusivity regulations. *Id.* at 12,814. The broadcasters argued that because they were bound by long-term exclusive contracts and were not reimbursed for the loss of their exclusive exhibition right by the program suppliers, they bore the full cost of the repeal of the exclusivity rules. *Id.* The CRT rejected this argument. *Id.* The first basis for rejection was that broadcasters cannot possess exclusive rights against a compulsory license and thus were not copyright owners within the meaning of § 201. *Id.* This interpretation may be an impairment of contract in violation of the United States Constitution because it renders the exclusivity term of the broadcasters' contracts void.

The second basis for rejecting the broadcasters' claim was that the broadcasters had been on notice that the syndicated exclusivity rules were subject to change at any time. Thus, they could have made appropriate adjustments in their contracts. *Id.* On appeal, the Second Circuit rejected the CRT's first basis for denying the broadcasters claim. *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 809 F.2d 172, 180 (2d Cir.) (*NAB III*), *cert. denied*, 475 U.S. 1035 (1986). The court, however, adopted the CRT's second theory and denied the broadcasters any royalty fees for loss of their exclusive exhibition rights. *Id.* at 181.

The Second Circuit's basis for denying relief is extremely questionable. Although the court's basis for denying relief was that the broadcasters could have adjusted their contracts to provide for the risk of regulatory change, *id.* at 181, no reference was ever made to the actual contracts between the broadcasters and the program suppliers. *See id.* The Second Circuit also did not

plexity of each of these disputes, this Note focuses only on the disputes between program producers and syndicators. On a general level, however, this Note's analysis pertains to all disputes between multiple copyright owners of a program.

## II. THE PRODUCER AND SYNDICATOR DISPUTES

Courts recently have addressed two disputes between a program producer and a syndicator regarding entitlement to the cable royalties for a retransmitted program.<sup>71</sup> The first pro-

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provide that, if the broadcasters had not adjusted their contracts for the risk of regulatory change, they individually could seek enforcement of their contractual rights in state court. *See id.* The reason for the Second Circuit's holding, however, becomes more clear by reference to another statement it made. The Second Circuit stated that if it were writing on a "clean slate" it would deny the broadcasters' claim "on the ground that elimination of syndicated exclusivity rights increased the demand for and exposure of syndicated programs, thus justifying increased royalties paid by the cable operators to the syndicators in the form of the syndex fund." *NAB III*, 809 F.2d at 180; *see also infra* note 109 (discussing the syndex fund). The broadcasters did not deserve royalties from the syndex fund because they were both "owners" and "infringers." *NAB III*, 809 F.2d at 179-80. Although a broadcaster is subject to competition from distant signals retransmitted into its own local area, it also may have its own signal retransmitted by cable into distant areas. *Id.* at 180.

The court's analysis is erroneous. First, although the court correctly recognized that cable retransmits a broadcaster's signal into distant markets, this fact does not make the broadcaster an infringer. The broadcaster receives no economic benefit from this retransmission. Secondly, the court erred when it stated that elimination of syndication exclusivity rules increased the exposure of programs to the detriment of the program suppliers. When a cable operator retransmits a program into a market where a broadcaster had contracted for the exclusive exhibition right of the program, the total number of program viewers in that market does not increase. Rather, the same number of viewers will be split between the broadcaster and cable operator. Because the broadcaster purchased the right to exhibit the program to the total number of viewers, the broadcaster, and not the program supplier, is injured by the repeal of the syndicated exclusivity rules. Copyright owners are injured only when broadcasters adjust their contracts to reflect their lower number of viewers. When a contract gives the broadcaster the exclusive exhibition right, this adjustment clearly has not occurred. Therefore, only by analyzing the relevant contracts can the court determine which party is entitled to the cable royalties.

71. 1984 Distribution, *supra* note 4, at 8,408, *modified*, *NBC v. Copyright Royalty Tribunal*, 848 F.2d 1289 (D.C. Cir. 1988) (first dispute); *Barris Indus. v. Worldvision Enters.*, 875 F.2d 1446 (9th Cir. 1989) (second dispute). Unlike the disputes between broadcasters and sports teams, and broadcasters and program suppliers, each of these two disputes arose over the right to cable royalties for an individual program rather than over the relative rights of each group in all programs. *Barris*, 875 F.2d at 1447; *NBC*, 848 F.2d 1290-91. This difference likely exists because program producers and syndicators are represented jointly by the MPAA in the distribution proceedings. Therefore, distribution of royalties between the two groups is done on a program by program basis outside of the CRT proceedings. *See supra* note 57.

ducer-syndicator dispute, *NBC v. Copyright Royalty Tribunal*,<sup>72</sup> arose in the 1984 CRT distribution process.<sup>73</sup> Each party argued on both contractual and statutory grounds that it was entitled to the cable royalties.<sup>74</sup> The CRT resolved the dispute in favor of the syndicator.<sup>75</sup> In doing so, the CRT stated that the syndicator was "the party to whom the Tribunal has in the past and will consistently in the future distribute Section 111 royalties."<sup>76</sup> The CRT, however, expressly provided that "[t]his rul-

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72. 848 F.2d 1289 (D.C. Cir. 1988).

73. This dispute was between NBC, the producer of "Little House on the Prairie," and Worldvision Enterprises, Inc., the syndicator, who had contracted with NBC to distribute off-network re-runs of "Little House." *NBC*, 848 F.2d at 1289. The contract between these parties transferred to Worldvision the "full and exclusive domestic distribution and profit participation rights . . . to the 'Little House on the Prairie' television series." 1984 Distribution, *supra* note 4, at 8409. These rights, however, were expressly limited to conventional free television distribution. *Id.*

74. Worldvision argued that it was entitled to the cable royalties because the royalties were profits derived from distribution to conventional free television and thus were within the contract terms. 1984 Distribution, *supra* note 4, at 8410. Worldvision contended that but for its distribution to conventional television there would be no initial transmission by broadcasters, no cable retransmission, and no cable royalties. *Id.* Moreover, Worldvision argued that FCC regulations prohibited NBC from engaging in the conduct necessary to give rise to cable royalties. *Id.*

Worldvision also argued that, because syndicators bear the risk of profit or loss in program distribution, compensating syndicators is consistent with the congressional intent to compensate copyright owners for cable's adverse impact on the marketability of their programs. *Id.*

Opposing Worldvision's contentions, NBC argued that the congressional intent of § 111 was to compensate the program creators for cable operators' use of their programs. Although NBC recognized that the copyright interest entitling the owner to cable royalties may be transferred, NBC argued that, in this case, there was no transfer. NBC contended that the compulsory license system is a government substitute for the right to license performance by cable systems. Because NBC granted Worldvision only the right to distribute the program to conventional television systems, Worldvision could not have acquired the right to license cable systems. Worldvision was not entitled to the cable royalties. Alternatively, NBC argued that the right to cable royalties attaches to the "performance" right and that it had only transferred the "distribution" right to Worldvision. *Id.*

75. 1984 Distribution, *supra* note 4, at 8411.

76. *Id.* In support of this "syndicator distribution" rule, the CRT stated that syndicators were the one party in the distribution chain most directly injured by cable retransmission of copyrighted programs, and that Congress intended to compensate those injured by cable retransmission. The CRT also found that because syndicators assumed the risk of successful exploitation of programs in the syndication market, equity entitled them to the cable royalties. The CRT also expressly rejected NBC's argument that Worldvision did not possess the performance right. The CRT stated that Worldvision must own the performance right because Worldvision authorized the broadcast stations to perform "Little House." *Id.*

ing does not foreclose the syndicator from remitting the cable copyright royalties up or down the chain of production and distribution pursuant to private contractual arrangement."<sup>77</sup> The CRT further stated that the CRT is not the proper forum for the resolution of contract disputes.<sup>78</sup>

On appeal, the D.C. Circuit upheld the CRT's distribution of royalties to the syndicator, but distinguished the distributee of cable royalties from the owner of cable royalties.<sup>79</sup> Specifically, the D.C. Circuit found that the CRT's syndicator distribution rule could exist for administrative convenience,<sup>80</sup> but that courts must look to the parties' contract to determine the "relevant owner."<sup>81</sup> Accordingly, the D.C. Circuit never resolved the question of cable royalty ownership.<sup>82</sup>

In the second dispute between a producer and a syndicator, *Barris Industries v. Worldvision Enterprises*,<sup>83</sup> the Ninth Circuit adopted the D.C. Circuit's holding that the parties' contract determines cable royalty ownership.<sup>84</sup> The *Barris* court then examined the syndication contract to determine cable royalty entitlement.<sup>85</sup> The relevant contract language gave the syndicator the exclusive right to license the program for "television."<sup>86</sup> "Television" was defined to exclude cable systems.<sup>87</sup>

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77. *Id.*

78. *Id.*

79. *NBC v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1293 (D.C. Cir. 1988).

80. *Id.* at 1296 n.6. The court deferred to the distribution rule as not contrary to § 111 nor its legislative history, which was silent on the issue. *Id.* at 1296.

81. *Id.* at 1295. The court referred the contract dispute to the state courts. *Id.*; see also *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828-29 (2d Cir. 1964) (noting that disputes over the contractual transfer of copyrights are matters for state courts), *cert. denied*, 381 U.S. 915 (1965).

82. See *NBC*, 848 F.2d at 1296 (stating that "[t]his disposition leaves the parties free to litigate their contractual claims in an appropriate forum"). The contractual right of Worldvision and NBC to the cable royalties was never litigated. Presumably, the parties settled.

83. 875 F.2d 1446 (9th Cir. 1989). This dispute was between Barris Industries, the producer of the "Newlywed Game" and Worldvision Enterprises, Inc., the syndicator of the program. *Id.* at 1447. The dispute was brought as a diversity action before a federal district court rather than before the CRT. *Id.* Use of this forum was consistent with the D.C. Circuit's holding that entitlement to cable royalties is a contractual question not properly resolved by the CRT. Under the terms of the contract, California law governed the contract's interpretation. *Id.* at 1450.

84. *Id.* at 1449.

85. *Id.* at 1449-51.

86. *Id.* at 1447. The St. Louis, New York, and Los Angeles markets were excluded by contract. *Id.*

The syndicator's compensation was to be thirty percent of the fees the producer "actually received" from the syndicator's licensing of television stations during the term of the contract.<sup>88</sup> The syndicator claimed that this language evidenced the parties' intent to split the cable royalties between them.<sup>89</sup>

The Ninth Circuit held that the contract provision prohibiting the syndicator from distributing the program to cable did not preclude a finding that the syndicator was entitled to a portion of the cable royalties.<sup>90</sup> The court, however, concluded that the compensation provision unambiguously entitled the producer to all cable royalties generated by the program.<sup>91</sup>

In both producer-syndicator disputes, the courts held that the contract between the producer and the syndicator determines the owner of the relevant copyright.<sup>92</sup> This holding implicitly recognizes that the original copyright owners — the producers — initially own the right to receive cable royalties and that they may transfer this right to the syndicators by contract. The courts rejected arguments that Congress intended for either the producer or the syndicator to always receive the royalties.<sup>93</sup> The next Part argues that the D.C. Circuit and the Ninth Circuit correctly held that producers may contractually transfer the right to cable royalties to syndicators and, in addition, provides the analysis necessary to understand the courts' rationale.

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87. *Id.*

88. *Id.*

89. *Id.* at 1449.

90. *Id.* at 1451.

91. *Id.* The court refused to consider extrinsic evidence introduced by Worldvision regarding the parties' intent because, under the test required by California law, the contract was not "reasonably susceptible" to Worldvision's proposed interpretation. *Id.* at 1450.

92. *Id.* at 1449; *NBC v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1293 (D.C. Cir. 1988). The D.C. Circuit stated that "ownership is itself dependent on the contractual terms; it cannot be settled without reference to those terms." *Id.* at 1294. This holding is distinguishable from the Second Circuit's holding in the dispute between broadcasters and program suppliers. *See supra* note 70. Although the Second Circuit recognized that program suppliers could transfer the right to cable royalties, they assumed without looking at their contracts that none had been made. *Id.*

In contrast, the CRT's holding in the sports teams-broadcasters dispute that the sports claimants should receive the cable royalties except "when contractual arrangements specifically provide that such royalties should be distributed to broadcaster claimants" is consistent with the D.C. Circuit's holding. *See supra* note 69 (discussing the sports teams-broadcasters dispute).

93. *Barris Indus. v. Worldvision Enters.*, 875 F.2d 1446, 1449 (9th Cir. 1989); *NBC*, 848 F.2d at 1296.

### III. THE RIGHT TO CABLE ROYALTIES: TRANSFERABILITY V. MANDATORY OWNERSHIP

In *NBC v. Copyright Royalty Tribunal*, the D.C. Circuit stated that honoring private contracts ensures that the party harmed by cable retransmissions receives the royalties and upholds the section 201(d) goals of alienability and divisibility of copyright.<sup>94</sup> The D.C. Circuit, however, never explained why the syndication contract determines the party harmed by cable retransmissions. Moreover, the court failed to demonstrate why the statutory transfer of ownership provision — section 201(d) — applies to cable royalties. Further analysis of the court's rationale is thus necessary.

#### A. COMPENSATING THE HARMED PARTY

Congress enacted section 111 to compensate the parties harmed by cable retransmissions of copyrighted programs.<sup>95</sup> The following analysis of cable television's impact on the syndication market<sup>96</sup> demonstrates that, although contractual arrangements initially determine the party injured by cable competition, the syndicator ultimately can pass all harm on to the program producer.

Instinctively, one might argue that program producers are harmed because cable retransmission exploits their programs in a new market without compensation.<sup>97</sup> Rather than increasing the total number of television viewers, however, cable competition primarily draws viewers away from commercial broadcast-

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94. *NBC*, 848 F.2d at 1293.

95. See HOUSE REPORT, *supra* note 38, at 90; see also *NBC*, 848 F.2d at 1293 (stating that "Congress intended that the cable royalties ultimately go to that party who was directly harmed by the retransmission — that is, the owner of the relevant copyright, who would otherwise be uncompensated for the exploitation of his or her property").

96. The discussion of the economic impact of cable television competition is limited to the market for syndicated programming for two reasons: 1) this Note focuses on the allocation of cable royalties between program producers and syndicators; and 2) the economic impact of cable on network programming is minimal. See *supra* note 54. This analysis also focuses only on independent syndicators because, when the syndicator and the producer are the same party, a dispute over cable royalties will not arise.

97. This was the misconception of the Second Circuit in a dispute between broadcasters and syndicators over cable royalties, catalyzed by the FCC's repeal of the syndicated exclusivity rule. *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 809 F.2d 172, 180 (2d Cir. 1986); see also *supra* note 70 (discussing the court's analysis).

ers.<sup>98</sup> As a result, broadcasters lose advertising revenue.<sup>99</sup> Broadcasters, however, can pass on this decrease in revenue to syndicators when the parties negotiate new contracts.<sup>100</sup> The extent that cable importation of programs saturates a given market determines whether syndicators receive a lower program licensing fee or no program licensing fee in that market.<sup>101</sup> This decrease in broadcast licensing revenue harms a syndicator in two circumstances.

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98. See Note, *Copyright Liability*, *supra* note 9, at 1516 (noting that independent broadcasters compete with cable stations and that when cable duplicates a program on the local independent station, fewer viewers watch the independent station).

99. Note, *Copyright Liability*, *supra* note 9, at 1516; Note, *Crossed Signals*, *supra* note 9, at 616. Theoretically, a broadcaster's new distant viewers offset the local loss of viewers. Independent broadcasters, however, cannot recoup the loss of advertising revenue in their local market because local advertisers place no value on the new distant audiences. See Selection of Television Signals for Cable Television Carriage, 57 F.C.C.2d 625, 640 (1976); see also Note, *Compulsory License*, *supra* note 9, at 939 (noting that broadcasters do not consider distant audiences marketable to local advertisers); Note, *Copyright Liability*, *supra* note 9, at 1516 & n.22 (noting that the "advertising on independent television stations is locally targeted and thus has no value in a distant market").

Initially, broadcasters were injured by the decrease in advertising revenue because the price they had paid for exhibition rights was based on a higher level of advertising revenue. See Note, *Copyright Liability*, *supra* note 9, at 1516. This phenomenon was especially prevalent when broadcasters contracted and paid for the exclusive exhibition rights of a program in their market only to have this right rendered worthless by cable importation of the identical program. Because broadcasters are unable to pass the decrease in advertising revenue on to the syndicators until their existing contracts expire, broadcasters should be entitled to some interim compensation. Unfortunately, no compensation has been forthcoming. For a discussion of this problem in the specific context of the syndicated exclusivity rule see *supra* note 70.

100. Cf. Note, *Copyright Liability*, *supra* note 9, at 1516 (noting that "[i]ndependent stations thus lose advertising revenue and correspondingly pay less for syndicated programming").

101. See, e.g., Meyer, *supra* note 9, at 546; Note, *Copyright Liability*, *supra* note 9, at 1516. *Contra* Note, *Crossed Signals*, *supra* note 9, at 615 (arguing that when a broadcaster's signal is retransmitted by cable, the copyright owner charges the broadcaster a fee based on a nationwide audience). Cable retransmission of programs hurts the marketability of a syndicator's programs in two ways. First, cable retransmission of *any* program into a given market creates viewer competition for a syndicator's programs in that market. Thus, the potential viewing audience for the syndicator's programs is reduced and, correspondingly, the revenue the syndicator can earn from licensing programs also decreases. Cable retransmission of *the syndicator's* programs also hurts the syndicator. When a cable operator picks up the syndicator's program from one market and retransmits it into a distant market, broadcasters in the receiving market probably lose interest in the program. Thus, the syndicator receives reduced licensing revenue.



The decrease in syndicator revenue caused by cable re-transmissions harm a syndicator when, at the time of contracting, it *expects* to receive cable royalties as compensation for the existing decrease in program marketability and, therefore, pays the producer for this right.<sup>102</sup> Such an expectation not only is feasible, but also is reasonable. A syndicator may expect to receive cable royalties because royalties would not exist but for the initial transmission of the program by broadcast stations.<sup>103</sup> The cable royalties thus are a direct result of the syndicator's licensing of broadcast stations.<sup>104</sup> Another reason for syndicators to expect royalties is that the CRT has consistently distributed cable royalties to syndicators in the past.<sup>105</sup> Consequently, if the syndicator compensated the producer for the right to receive cable royalties, the syndicator must actually receive the cable royalties to prevent harm.

Even if the syndicator did not pay the producer for the right to cable royalties, a decrease in broadcast licensing revenues harms a syndicator when it occurs *after* the contract was formed. Broadcast licensing revenues decrease if the regulatory structure changes in favor of cable operators.<sup>106</sup> When reg-

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102. In essence, the syndicator recognizes that because of cable competition, broadcast licensing revenues will be lower than the pre-cable level. Rather than adjusting downward the price paid for the distribution right, however, the syndicator believes that cable royalties will make up the difference and thus agrees to the old price level. In contrast, if the syndicator does not expect to receive any of the cable royalties, the syndicator will adjust the price paid for the distribution right to reflect the decrease in broadcast licensing revenue. When the syndicator acquires the distribution right through an outright sale, the syndicator simply will pay less for the right. When the syndicator receives a fixed percentage of the revenues generated through broadcast licensing, the syndicator will demand an upward adjustment in the percentage to compensate for the loss of revenues with no corresponding decrease in costs. The syndicator still must market to, negotiate with, and physically distribute the program to the independent broadcast stations. The only arguable decrease in costs would come from lower distribution costs resulting from lower sales. The increase in marketing costs necessary to make sales in a less favorable market, however, probably would offset any such decrease.

103. See *supra* notes 34-38 and accompanying text (discussing how cable operates).

104. See *NBC v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1292 (D.C. Cir. 1988) (noting that the syndicator made this argument).

105. See 1984 Distribution, *supra* note 4, at 8411; see also 1978 Distribution, *supra* note 11, at 63,032 (stating that "Congress intended for royalties to be distributed to program syndicators and not to local stations").

106. Numerous regulatory changes have occurred since the compulsory license system was adopted. In 1977, the courts struck down the FCC's "anti-siphoning" rules, which had placed stringent limits on the ability of cable systems to acquire programming. *In re Compulsory License for Cable Retransmission*, 4 F.C.C. Rec. 6711, 6718 (1989). In 1981, the FCC eliminated both its

ulatory changes allow cable operators to become more competitive, broadcasters lose viewers. The resulting decrease in broadcaster advertising revenue subsequently reduces the amount broadcasters will pay syndicators for program exhibition rights.<sup>107</sup> At the same time, cable royalties increase.<sup>108</sup> If the syndicator does not receive this increase in cable royalties<sup>109</sup> to offset the decrease in its licensing revenues, the syndicator is harmed because it paid for a level of broadcast licensing revenue that it no longer receives.<sup>110</sup> Moreover, this harm is aggravated because most syndication agreements are long-term.<sup>111</sup>

Recognizing that cable retransmissions may harm syndicators under existing contracts does not warrant making syndicators the mandatory owners of cable royalties. Once existing

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distant signal and syndicated exclusivity rules. *Id.* In 1985, the courts struck down the FCC's "must carry" rules, which required cable operators to carry local signals. *Id.* In 1988, the FCC reimposed the syndicated exclusivity rules. *Id.* All but the last regulatory change were favorable to cable operators.

107. See *supra* notes 99-101 and accompanying text. For example, if cable operators are allowed to retransmit more distant signals, cable operators can offer more diverse programming thus diverting viewers away from conventional broadcast stations. See *Malrite T.V. v. FCC*, 652 F.2d 1140, 1143 (2d Cir. 1981).

108. *Malrite T.V.*, 652 F.2d at 1143. Cable royalties increase when FCC restrictions are repealed because the CRT adjusts the statutory royalty rate to reflect FCC deregulations, 17 U.S.C. § 801(b)(2)(B),(C) (1988), and because deregulated cable companies are able to generate more gross revenue upon which the cable royalties are based. See *supra* notes 55-58 and accompanying text. Other factors also affect the actual growth of cable and broadcast revenues. A regulatory change that does not result in an actual decrease in broadcast licensing revenues, however, may still create a relative decrease.

109. Theoretically, the producer could receive the level of cable royalties existing prior to the regulatory change and the syndicator could receive only the subsequent increase in cable royalties. This distribution is feasible because the level of cable royalties existing at the time of contracting and the subsequent increase in the level of cable royalties resulting from regulatory change are divisible. In fact, the CRT has established a system whereby increases in cable revenues resulting from regulatory changes are distributed through separate funds. See 1983 Distribution, *supra* note 57, at 12,807-08. These funds are known as the syndex fund and the 3.75% fund. *Id.* at 12,807. This system would facilitate distribution of the increase in cable royalties to the syndicators when they are not entitled to the royalties from the standard fund. The increase in cable royalties resulting from an increase in cable revenues, however, is not fully reflected in these special funds.

110. See 1984 Distribution, *supra* note 4, at 8411 (noting that "whatever harm that might result [to] the successful exploitation of [the program] in the off-network syndication market due to cable distant signal importation became entirely [the syndicator's] to bear").

111. The duration of most syndication agreements is between 10 and 20 years. NETWORK INQUIRY, *supra* note 10, at 121.

distribution contracts expire, syndicators can adjust their new contracts to avoid all harm. If syndicators know, at the time of contracting, that they will not receive cable royalties, they will not pay producers for this right.<sup>112</sup> Rather, the decreased level of broadcast licensing revenues alone will determine the price paid for the distribution right. Additionally, to mitigate the harm caused by a post-contract regulatory change favorable to cable, syndicators can discount the price paid for the distribution right to reflect this risk.<sup>113</sup> In effect, the producer pays the syndicator to assume the risk of regulatory change.

In summary, the D.C. Circuit correctly recognized that courts must honor current contractual arrangements to ensure that the party harmed receives the cable royalties.<sup>114</sup> In subsequent contracts, however, broadcasters and syndicators can pass all harm resulting from cable competition to the producer. Thus, the D.C. Circuit's "compensating the party harmed" rationale does not justify a prospective rule that recognizes syndicator ownership of the cable royalties. As demonstrated below, however, other reasons exist for recognizing syndicator ownership of cable royalties.

#### B. SECTION 201(d) DIVISIBILITY AND ALIENABILITY

The D.C. Circuit also found support for its holding in section 201(d) of the 1976 Copyright Act. Section 201(d) provides that a copyright is infinitely divisible and that its owner may transfer any division of the copyright.<sup>115</sup> The D.C. Circuit found that "[t]he goals of alienability and divisibility of copyrights would . . . be subverted if private contracts were not enforced properly."<sup>116</sup> The court, however, failed to explain why the right to cable royalties falls within the scope of section 201(d). Rather, the D.C. Circuit deferred to the CRT's expertise to fill the statutory gap left by Congress.<sup>117</sup> The CRT, how-

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112. See *supra* note 102.

113. Cf. Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 84 (1977) (noting that "[t]he fact that people are willing to pay to avoid risk shows that risk is a cost").

114. See *NBC v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1293 (D.C. Cir. 1988).

115. See *supra* text accompanying note 65.

116. *NBC*, 848 F.2d at 1293.

117. *Id.* at 1296. The conclusion that Congress never considered the impact of divisibility on cable royalty ownership is likely correct. For many programs, the producer and the syndicator are the same party. Furthermore, prior to the 1976 Copyright Act, the divisibility of a copyright was not recognized. See

ever, has not addressed the interaction of section 201(d) and cable royalty ownership.<sup>118</sup> The following sections demonstrate that section 201(d) should extend to cable royalty ownership.

### 1. The Statutory Language

To fall within the statutory language of section 201(d)(2), the right to cable royalties must be either an exclusive right or a subdivision of one or more of the five enumerated rights specified in section 106.<sup>119</sup> Although the "right to cable royalties" is not one of the exclusive rights enumerated in section 106,<sup>120</sup> one can argue that the section 106 list is illustrative not exhaustive. The legislative history of the 1976 Copyright Act implies that there are additional exclusive rights.<sup>121</sup>

The right to cable royalties, however, is not comparable to traditional exclusive rights. All five of the enumerated exclusive rights focus on the copyright owner's conduct.<sup>122</sup> Furthermore, these rights accrue when the copyright owner receives the copyright.<sup>123</sup> The right to cable royalties, in contrast, does not focus on the copyright owner's conduct. Rather, the right to cable royalties requires that the CRT give the cable royalties to the copyright owner.<sup>124</sup> Moreover, this right does not accrue to the copyright owner upon receiving a copyright. Before any

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HOUSE REPORT, *supra* note 38, at 123. Thus, no history of conflict existed to arouse legislative concern. Cf. Note, *Trials of the Tribunal: Toward a Fair Distribution of Jukebox Royalties*, 16 SW. U.L. REV. 757, 778 & n.239 (1986) (discussing Congress's failure to distinguish between music writers and music publishers and the problems this oversight created in the distribution of jukebox royalties).

118. When establishing its syndicator distribution rule, the CRT did state that the syndicator is typically the party injured by cable retransmission. 1984 Distribution, *supra* note 4, at 8411. The CRT, however, failed to justify this rule in terms of § 201(d). Moreover, now that this rule is in place and courts are resolving contractual disputes that arise, *e.g.*, *NBC*, 848 F.2d at 1296-97, the CRT likely will never address the interaction of § 201(d) and statutory cable royalties.

119. See *supra* note 65 and accompanying text (quoting statutory language).

120. See *supra* note 44 for the list of exclusive rights included in 17 U.S.C. § 106 (1988).

121. See HOUSE REPORT, *supra* note 38, at 123 (stating that "any of the exclusive rights that go to make up a copyright, *including* those enumerated in section 106 . . . can be transferred and owned separately" (emphasis added)).

122. See 17 U.S.C. § 106 (1988). For example, copyright owners have sole discretion whether or not to reproduce their copyrighted works. Thus, if a copyright owner decides to reproduce her work, she can do so without relying on the prior conduct of anyone else.

123. See *id.* For example, a copyright owner can reproduce her work immediately.

124. 17 U.S.C. § 111(d)(4) (1988).

right to cable royalties can arise, a cable operator must retransmit the copyrighted work.<sup>125</sup> The right to cable royalties thus does not appear to be a new exclusive right. This conclusion is consistent with the Congressional statement that the section 111 compulsory license system is a limitation on the enumerated exclusive rights.<sup>126</sup>

If not a new exclusive right, the right to cable royalties somehow must attach to one or more of the five enumerated rights.<sup>127</sup> How and to which enumerated rights the royalties attach is determined by analyzing the compulsory license system. Congress adopted the compulsory license system as a substitute for a free market system of full copyright liability.<sup>128</sup> In a free market, cable operators would have to negotiate with copyright owners for the right to "perform" copyrighted programs.<sup>129</sup> Accordingly, the party entitled to license cable operators to "perform" copyrighted programs also would be entitled to cable royalties.<sup>130</sup> The right to license cable operators to perform copyrighted programs is not a new exclusive right; it is a subdivision of the distribution right<sup>131</sup> and a subdivision of the performance right.<sup>132</sup> The licensor, by necessity, must have both

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125. A copyright owner cannot collect cable royalties upon receipt of her copyright. See 17 U.S.C. § 111(c)(1) (1988).

126. See *supra* note 48 and accompanying text.

127. See *NBC v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1294 (D.C. Cir. 1988) (stating that "the right to cable royalties [is] one of the incidents of ownership"). Recognizing that the right to cable royalties is an incident of ownership, however, does not answer the question as to which exclusive right the royalties attach. This determination must be made because the owner's ability to transfer the individual rights separately. See *supra* text accompanying note 114; see also *NBC*, 848 F.2d at 1293 (stating that "determining that a party owns a copyright may be insufficient, for, as here, there may be more than one party able to claim the benefits of a copyright for portions of the property in question"); *infra* note 132 (discussing the separability of exclusive rights in the cable context).

128. HOUSE REPORT, *supra* note 38, at 89. One reason Congress chose the compulsory license system was because it believed that the transaction costs incurred in the bargaining between copyright owners and cable operators would be prohibitively expensive. *Id.*

129. *Id.*

130. This right must be defined in terms of "licensing" because the right to distribute copyrighted programs to cable operators is not divisible from the right to distribute to independent broadcasters. See *infra* note 133.

131. 17 U.S.C. § 106(3) (1988). Section 106 provides, in part, that the copyright owner has the exclusive right to "distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." *Id.*

132. 17 U.S.C. § 106(4) (1988). Because a cable licensor would not perform the copyrighted program, but rather would license others to do so, the licensor's "performance" right is dormant.

these rights.<sup>133</sup> Granting licensees the right to perform the copyrighted program publicly without making the program physically available to them would be valueless. Alternatively, providing licensees with physical access to the copyrighted program without also granting them the right to perform the program publicly would be valueless.

Although in a compulsory license system the actual licensing of cable operators is not necessary, the right to cable royalties remains an economic benefit resulting from ownership of the appropriate subdivision of the distribution right and performance right.<sup>134</sup> Section 201(d) allows copyright owners to transfer any subdivision of the distribution right and performance right.<sup>135</sup> Thus, copyright owners may transfer the subdivision of the copyright to which cable royalties attach.

## 2. The Economic Benefits

In addition to falling within the statutory language of sec-

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133. Congress expressly recognized that the "exclusive rights, which comprise the so-called 'bundle of rights' that is a copyright, are cumulative and may overlap in some cases." HOUSE REPORT, *supra* note 38, at 61. The right to license performance of programs must be distinguished from physical distribution of the programs. Physical distribution to independent broadcasters and cable operators are indistinguishable. In fact, syndicators cannot distribute to independent broadcasters without also distributing to cable operators. Physical access to programs, however, does not give cable operators the right to retransmit them. Rather, cable operators must be licensed. Therefore, syndicators' distribution of programs to cable companies without also transferring a performance right does not give cable companies the right to retransmit the programs.

Cable royalty claimants previously have argued that ownership of the distribution right or performance right entitled them to the cable royalties. For example, in a dispute between broadcasters and program suppliers, the broadcasters claimed that the cable royalties attached to the exclusive exhibition right. 1983 Distribution, *supra* note 57, at 12,806-07. The exhibition right is the equivalent of the performance right. Likewise, in the first dispute between a producer and a syndicator, the producer argued that the performance right included the right to cable royalties. 1984 Distribution, *supra* note 4, at 8410. In this same dispute, the syndicator argued that the right to cable royalties attached to the exclusive right to distribute the program. *Id.* The claimants, however, failed to recognize that subdivisions of both the distribution right and performance right are necessary. Furthermore, the claimants failed to recognize that because each exclusive right is divisible, the "stick" they owned may not be the appropriate subdivision.

At one time, the producer actually argued that the right to cable royalties was a substitute for the right to license cable operators. *Id.* The problem with this argument was not its accuracy, but that it does not support the proposition that the producer is, therefore, entitled to the cable royalties.

134. See *supra* note 44.

135. See *supra* text accompanying note 65.

tion 201(d), the purpose underlying section 201(d) applies to the right to cable royalties because economic benefits accrue when the producer transfers this right to the syndicator. As discussed above, the amount of broadcast licensing revenue is inversely related to the amount of cable royalties.<sup>136</sup> Consequently, when syndicators receive both broadcast licensing revenue and cable royalties, any decrease in broadcast licensing revenue resulting from regulatory change is offset by a corresponding increase in cable royalties.<sup>137</sup> Likewise, any decrease in cable royalties is offset by an increase in broadcast licensing revenue. In effect, the syndicator has diversified away the risk of regulatory change.<sup>138</sup>

The producer also receives numerous benefits from transferring the right to cable royalties to the syndicator. First, the producer receives full value for the distribution right because the syndicator no longer will discount the price paid for the distribution right to reflect the risk of regulatory change.<sup>139</sup> In addition, the neutralization of regulatory change may encourage syndicators to provide more advance financing of programs and may even increase the number of syndication agreements.<sup>140</sup>

The producer also benefits because the transfer of cable royalties removes the syndicator's incentive to not market programs to broadcast stations whose signals are retransmitted by cable. When a cable company retransmits a program to a distant market, the syndicator loses broadcast licensing revenue from that program in the receiving market.<sup>141</sup> When the syndicator receives the royalty for the cable retransmission, however, retransmission does not injure the syndicator. Thus, the syndicator will market programs to broadcast stations whose signals are retransmitted by cable.

Furthermore, transferring the right to cable royalties to the syndicator also shields the producer from the risk of a downward fluctuation in cable royalties resulting from a regu-

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136. See *supra* notes 107-08 and accompanying text.

137. *Id.*

138. Cf. Posner & Rosenfield, *supra* note 113, at 85 (noting that diversifying risk eliminates or minimizes the risk by pooling it with other uncertain events).

139. See *supra* note 113 and accompanying text.

140. See *supra* note 26 and accompanying text.

141. See Brotman, *supra* note 9, at 481-82. As a result of this injury, syndicators refuse to sell their programs to broadcast stations retransmitted by cable. For example, a Chicago station could not purchase the right to broadcast the NCAA basketball playoff games because the station's signal was picked up by satellite and distributed nationwide to cable systems. *Id.*

latory change unfavorable to cable.<sup>142</sup> Although in today's deregulatory climate this risk is probably minimal, a resurgence of independent broadcaster protectionism may occur. Because most syndication contracts are long term,<sup>143</sup> producers cannot ignore the risk of regulatory change unfavorable to cable.

Eliminating the risk of fluctuation in broadcast licensing revenues benefits both the syndicator and the producer because it facilitates their agreement on the price of the distribution right. The producer and syndicator need only examine the potential revenue the program can generate in the market as a whole.<sup>144</sup> Moreover, the parties need not calculate a discount for the threat of regulatory change.<sup>145</sup> As a result, the negotiation process becomes more efficient and transaction costs are decreased.

In summary, the right to cable royalties attaches to subdivisions of the distribution right and the performance right, both falling within the statutory language of section 201(d).<sup>146</sup> Furthermore, numerous economic benefits result from the transferability of cable royalties.<sup>147</sup> Thus, the D.C. Circuit correctly concluded that the producer can transfer the right to cable royalties.

#### IV. THE CONTRACTUAL RIGHT TO CABLE ROYALTIES

Recognizing that the right to cable royalties is an economic

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142. Cf. *supra* notes 106-08 and accompanying text (discussing the impact of a regulatory change favorable to cable). Like the risk to the syndicator when the syndicator only receives broadcast licensing revenue, when the producer only receives cable royalties, the producer is unable to offset a decrease in cable royalties caused by an unfavorable regulatory change.

143. See *supra* note 111.

144. The parties need not try to predict what percentage of viewers will watch the program on commercial television and what percentage will watch the program on cable.

145. See *supra* note 113 and accompanying text.

146. See *supra* note 65 (quoting statutory language).

147. Courts could ensure these economic benefits by adopting a rule that mandatorily places the cable royalties with the syndicator. The parties could adjust their contracts for such a rule. The parties also may benefit by streamlining contract negotiations. A mandatory rule, however, has negative effects that outweigh these benefits. Adopting a mandatory rule ignores contractual relations entered prior to the rule's adoption and is unfair to producers who contractually retained the right to cable royalties. See text accompanying notes 112-13. Furthermore, a mandatory rule destroys flexibility. In certain situations, the parties may prefer to assume the risk associated with a separation of broadcast licensing revenues and cable royalties.



benefit attaching to a subdivision of a program's copyright, and that a producer may transfer this right, provides a starting point for determining who should receive cable royalties. How courts and practitioners, respectively, should interpret and draft contracts to ensure that the correct party receives the cable royalties, remains an open question.

#### A. A FRAMEWORK FOR ANALYZING CONTRACTS

If all contracts between producers and syndicators expressly stated who should receive the cable royalties, courts would have an easy time determining cable royalty ownership.<sup>148</sup> Unfortunately, syndication contracts often do not specify the cable royalty owner. Producers and syndicators enter into long-term relational contracts in which profits frequently are shared.<sup>149</sup> Because of the ongoing interaction between the two parties, they are less likely to articulate fully every issue that may arise during the contract's life.<sup>150</sup> Failure to provide for cable royalty ownership is especially likely under a compulsory license system because neither party has to engage physically in the licensing of cable operators. Furthermore, until 1988, courts did not recognize that the right to cable royalties was capable of specific contractual transfer and did not mandatorily belong to either the producer or the syndicator.<sup>151</sup>

Simply because the syndication contract fails to provide specifically for the transfer of cable royalties, however, does not mean that this right remains with the producer.<sup>152</sup> As demonstrated above, the right to cable royalties attaches to subdivisions of the distribution right and the performance right.<sup>153</sup> Every contract between a producer and a syndicator involves

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148. For example, if the contract expressly states that the syndicator is entitled to cable royalties, one safely can assume that the syndicator paid for this right. The producer certainly would not give the syndicator this right for free.

149. See *supra* notes 24, 111.

150. See MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854, 903 (1978); Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 487 n.50 (1985).

151. See *NBC v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1293 (D.C. Cir. 1988). Although, in the future, syndicators and producers contractually may provide for the right to cable royalties, this does not help with the allocation of cable royalties between producers and syndicators under existing contracts.

152. Cf. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 (2d Cir.) (stating that "[i]f the words are broad enough to cover the new use, it seems fairer that the burden of framing and negotiating an exception should fall on the grantor"), *cert. denied*, 393 U.S. 826 (1968).

153. See *supra* text accompanying notes 131-33.

the transfer of some portion of the exclusive distribution right and the exclusive performance right. Syndicators, by necessity, must receive both these rights or they physically could not provide broadcasters with programs or license broadcasters to perform programs.<sup>154</sup> Possession of these rights, however, does not automatically give syndicators the right to license both broadcasters and cable operators. Because both the performance and distribution right can be infinitely subdivided,<sup>155</sup> it is possible for the producer to transfer only the portion of these rights necessary for the syndicator to license broadcasters, and not the portion of these rights to which the cable royalties attach.<sup>156</sup>

Courts must decide whether the distribution right and performance right transferred to the syndicator includes the right to cable royalties. As the first step in resolving contract disputes over cable royalty ownership, courts should look for evidence that the syndicator expected to receive all or a portion of the cable royalties, and therefore paid the producer for this right.<sup>157</sup> As recognized by the Ninth Circuit in *Barris*,<sup>158</sup> a strong indicator of the syndicator's expectations to cable royal-

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154. Although syndicators are considered the program distributors, their duties consist of licensing broadcast stations to perform the copyrighted program. Thus, they also must have a "dormant" performance right. See 1984 Distribution, *supra* note 4, at 8411; see also *supra* note 132 and accompanying text (discussing a cable licensor's dormant performance right).

155. HOUSE REPORT, *supra* note 38, at 61.

156. See *NBC*, 848 F.2d at 1295 (denying syndicator with exclusive distribution license a per se right to cable royalties); *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 809 F.2d 172, 181 (2d Cir.) (*NAB III*), cert. denied, 475 U.S. 1035 (1986) (denying broadcasters with exclusive exhibition licenses any right to cable royalties). In practice, the right to license cable operators would be very difficult to separate from the right to license broadcasters. Because syndicators and independent broadcasters are hurt by cable competition, these parties would have an interest in making the cable licensing process difficult. By withholding information about which programs the independent broadcasters intend to transmit, the syndicators and broadcasters may prevent the cable operators from acquiring the necessary licenses. Cf. Glist, *Cable Copyright: The Role of the Copyright Office*, 35 EMORY L.J. 635, 638 (1986) (noting that, in a free market, a single program supplier could frustrate cable carriage of a broadcaster's signal by withholding the necessary license). This problem is compounded because each program included in a broadcast day may have a different licensor. *Id.* This problem, however, can be resolved by a blanket license system, a system of licensing after the retransmission, or simply by monitoring the independent broadcaster's promotional activity. Although inefficient, someone other than the syndicator conceivably could license cable operators. Thus, recognizing that the right to cable royalties is a separate division of the copyright bundle is valid. See *supra* notes 119-35 and accompanying text.

157. See *supra* note 102 and accompanying text.

158. *Barris Indus. v. Worldvision Enters.*, 875 F.2d 1446 (9th Cir. 1989).

ties is how broadly the contract states the basis for the syndicator's compensation.<sup>159</sup> If the compensation clause is broad, giving the syndicator all or a portion of the revenues *resulting from* the licensing of broadcast stations, the syndicator probably expects to receive a corresponding portion of the cable revenue. The syndicator forms this expectation because cable royalties are a direct result of her distributing the programs to broadcast stations.<sup>160</sup> Moreover, limiting the syndicator's licensing right to broadcast stations will not negate this expectation because licensing of cable operators is not necessary to generate cable royalties.<sup>161</sup> Rather, under a compulsory license system, cable operators only need access to the programs.

On the other hand, the compensation clause may be narrow, specifically limiting the syndicator's compensation to a portion of the *actual* broadcast licensing fees.<sup>162</sup> Because such a provision refers only to revenue received from broadcast stations with whom the syndicator negotiated actual agreements, the syndicator probably does not expect to receive cable royalties<sup>163</sup> and will not compensate the producer for this right.

Unfortunately, the compensation provision is not dispo-

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159. See *id.* at 1451.

160. See *supra* notes 103-04 and accompanying text. If a free market rather than a compulsory license system exists, however, providing the cable operators with physical access to the programs will not give the cable operators the right to retransmit the programs. Rather, the cable operators need a license. Thus, in a free market, syndicators should not expect to receive cable royalties absent the right to license cable operators.

Under a compulsory license system, however, the right to cable royalties is, in effect, a substitute for the right to license cable operators. See *supra* notes 128-30 and accompanying text. Therefore, if Congress replaces the current system with a free market system, syndicators who currently own the right to cable royalties should receive the right to license cable operators. If not, the syndicators' expectations will be undermined and they will be harmed.

161. The Ninth Circuit recognized that a contract provision precluding the syndicator from licensing cable operators is, in most situations, not determinative. 875 F.2d at 1451 (stating that "[d]espite this restriction it would have been quite possible for the parties to agree that Worldvision would receive all or part of the royalties flowing from cable rebroadcast of transmissions by over-the-air television").

162. See *id.* In *Barris*, the compensation clause provided that:

Worldvision is to receive as "full and complete compensation," thirty percent of gross receipts, defined as "all license fees actually received by us under License Agreements . . ." "Under License Agreements" clearly refers to amounts received from over-the-air television stations with whom Worldvision negotiated agreements and not to amounts received as statutory cable royalties.

*Id.*

163. See *id.* at 1449.

tive of cable royalty entitlement. If syndicators believe they are legally entitled to cable royalties, they will bid up the price of program distribution rights to reflect this additional source of revenue regardless of the compensation provision.<sup>164</sup> Because confusion still exists as to how cable royalty ownership is determined,<sup>165</sup> it is possible that contracts exist in which the syndicator expected to receive and thus paid for cable royalties. To determine whether a syndicator paid for the right to cable royalties, courts can compare the price the syndicator paid for the distribution right of the disputed program with the price paid for the distribution right of similar programs that either expressly included or excluded the right to cable royalties.

After looking for contractual clues to cable royalty entitlement, courts should examine the parties' conduct with regard to cable royalties. If one of the parties received all the royalties or if the royalties were shared prior to the litigation, this conduct serves as strong evidence of what the parties considered fair. Moreover, the prior distributions indicate what the parties would have contracted for if they had considered the issue of cable royalty ownership.<sup>166</sup>

If the court concludes that, at the time of contracting, the parties intended that the producer receive the royalties, the court then must determine whether the syndicator discounted the price paid for the distribution right to reflect the risk of future regulatory changes unfavorable to broadcasters.<sup>167</sup> Unless the syndicator paid the producer to assume this risk, the syn-

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164. In a competitive market, the price paid for a product will reflect its true value. The right to receive cable royalties adds value to the distribution right. Thus, because syndicators will pay for cable royalties if they expect to receive them, whether the producer intended to transfer the royalties is irrelevant. To allow this fact to preclude the syndicator from royalty entitlement would be inequitable. The producer would be compensated for cable retransmission twice and the syndicator would have paid for them twice.

165. In both *Barris* and *NBC*, the syndicator argued that Congress intended syndicators to receive the cable royalties. *Barris Indus. v. Worldvision Enters.*, 875 F.2d 1446, 1449 (9th Cir. 1989); *NBC v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1292 (D.C. Cir. 1988); see also 1984 Distribution, *supra* note 4, at 8411 (noting the arguments the syndicator made to the CRT).

166. The Ninth Circuit failed to recognize this fact in *Barris*. The court refused to consider evidence that the parties had been splitting the cable royalties because they found the contract not reasonably susceptible to this interpretation. *Barris*, 875 F.2d at 1450. The court also found no indication that the parties considered the issue of cable royalties at the time of contracting. *Id.* It seems unlikely that the compensation provision could be dispositive of cable royalty entitlement given the parties failure to consider this issue when drafting the contract and the parties subsequent conduct.

167. See *supra* note 113 and accompanying text.

dicator is entitled to increases in cable royalties to offset any corresponding decreases in licensing revenues. The syndicator must foresee the threat of regulatory change before it will discount the price.<sup>168</sup> Courts thus should look for evidence that the parties anticipated this risk.<sup>169</sup> If there was no discount the syndicator is entitled to the increase in cable royalties even though the producer is entitled to the level of cable royalties existing before the regulatory change. Although the courts and the CRT may have difficulty administering this rule, it is the only distribution that will compensate the parties in relation to their harm.

If the court is unable to determine cable royalty entitlement, it should split the royalties between the producer and syndicator in the same manner in which the parties divide broadcast licensing revenues. This resolution eliminates the possibility that the syndicator would receive only increases in cable royalties resulting from regulatory change while the producer would receive the remainder.<sup>170</sup> Furthermore, by alleviating the risk of regulatory change,<sup>171</sup> this approach promotes economic benefits.<sup>172</sup> Moreover, because of these economic

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168. Cf. Posner & Rosenfield, *supra* note 113, at 85 (stating that for the insurer to know how much to ask from the other party to the contract for bearing the risk in question, the probability and magnitude of the risk must be known).

169. Evidence may include contract price and reference to regulatory change in contract negotiations.

170. See *supra* note 109 and accompanying text.

171. See *supra* text accompanying notes 137-38. One goal of courts is to encourage efficient risk-bearing. See Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311, 314 (1982). Additional goals include: 1) minimizing the legal costs of resolving disputes; 2) minimizing the costs to the parties of bargaining the terms of contracts; and 3) providing simple rules that apply to a broad variety of situations. *Id.* A rule splitting cable royalties between the producer and the syndicator when the contract does not provide for an alternative distribution furthers these goals by providing certainty and flexibility in negotiation.

172. See *supra* text accompanying notes 137-45. Maintaining the CRT's syndicator distribution rule also will help promote the economic benefits resulting from risk reduction. Because the syndicator receives the cable royalties, producers are likely to transfer the right to cable royalties to the syndicator rather than trusting the syndicator to pass on the royalties. Thus, a syndicator distribution default rule honors current contractual relationships while providing the parties with a strong incentive to place the right to cable royalties in the syndicator. Furthermore, it gives parties the flexibility to contract around the rule.

In *Barris*, the Ninth Circuit stated that it did not "reach the issue of whether it is appropriate for the CRT to distribute royalties to [the producer] in the first instance." 875 F.2d 1446, 1449 n.1. Based on the benefits of the syndicator distribution rule discussed above, the Ninth Circuit erred by drawing

benefits, a rule that gives syndicators a portion of cable royalties equal to the percentage of broadcast licensing revenues received likely reflects the contractual relationship that would exist if the parties had contemplated the distribution of cable royalties.

## B. A FRAMEWORK FOR DRAFTING CONTRACTS

Producers and syndicators can avoid contractual disputes regarding cable royalty entitlement by expressly and unambiguously providing for this right in their syndication contracts. Often this type of drafting is easier said than done. The key is to address every issue that may arise. This Note provides a list of issues regarding cable royalties that producers and syndicators should address when drafting syndication agreements.<sup>173</sup>

### Syndication Agreement Checklist

1. Which party is entitled to the statutory cable royalties?
2. If divided between the producer and syndicator:
  - a. What should be the percentage split?
  - b. How should the costs related to the CRT proceedings be factored in?
  - c. Which party should represent the program before the CRT?
3. If the compulsory license system is abolished and a free market system established:
  - a. Which party should have the right to license cable operators?
  - b. Will the cable licensing revenue be divided on the same basis as the statutory cable royalties were?
  - c. How should the costs related to cable licensing be factored in?

If the answers to the above questions are clearly provided for in syndication agreements, producers and syndicators can avoid disputes over cable royalty entitlement. Furthermore, by answering the above questions in the following recommended manner, producers and syndicators can achieve economic efficiency in the distribution process.

Because the risk of regulatory change is diversified away when the syndicator receives both broadcast licensing revenue and cable royalties,<sup>174</sup> syndicators should be entitled to a per-

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into question the rule's validity and efficiency. Although this rule may not always be consistent with contractual ownership of cable royalties, it is consistent with the contractual relationship most likely found in the marketplace. Thus, courts should not discard the rule.

173. In addition to the listed issues, drafters of all syndication agreements must face issues concerning the basis for dividing revenue, the duration of the syndicator's distribution rights, the geographical limits of the distribution right, and the amount of advance financing by the syndicator. NETWORK INQUIRY, *supra* note 10, at 120.

174. See *supra* text accompanying notes 137-38.

centage of the royalties at least equal to the percentage of broadcast licensing revenues they receive. Also, because syndicators usually are more aware of cable retransmission of the programs they distribute,<sup>175</sup> making syndicators responsible for representing programs before the CRT is logical. This allocation is consistent with the CRT's syndicator distribution rule.<sup>176</sup> Furthermore, the expertise of syndicators in licensing broadcasters makes them the appropriate party to license cable operators in a free market system.<sup>177</sup> This is especially true because a syndicator's distribution of programs to broadcasters is, in effect, a distribution to cable operators.<sup>178</sup> The parties should split the resulting revenues on the same basis they split the statutory cable royalties. Because the cost of licensing cable operators will surely increase in a free market system,<sup>179</sup> the parties must consider this additional cost. A recommended solution is to subtract licensing costs off the top before the producer and syndicator split the licensing revenues. If the above recommendations are followed, producers and syndicators will establish an efficient distribution system that benefits not only themselves, but also the viewing public.<sup>180</sup>

### CONCLUSION

By adopting a compulsory license system for cable retransmission of copyrighted programs and recognizing the divisibility of a copyright, the 1976 Copyright Act opened the door for disputes between producers and syndicators over the ownership of cable royalties. In *NBC v. Copyright Royalty Tribunal*, the first producer-syndicator dispute, the D.C. Circuit held that the syndication contract determines ownership of cable royalties. The court, however, did not provide the basis for its holding and failed to demonstrate how the right to cable royalties fit within the enumerated exclusive rights of section 106. In *Barris Industries v. Worldvision Enterprises*, the second producer-syn-

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175. By licensing broadcasters, syndicators learn which programs cable operators have retransmitted into which markets.

176. See *supra* note 76 and accompanying text.

177. Not only do syndicators have the licensing mechanism in place, but they also know which programs broadcasters are going to transmit and thus are available for cable retransmission.

178. See *supra* note 133.

179. Congress, in fact, established a compulsory license system because it feared that the negotiations required by a free market system would be unduly burdensome. See HOUSE REPORT, *supra* note 38, at 89.

180. See *supra* text accompanying notes 136-46.

dicator dispute, the Ninth Circuit adopted the D.C. Circuit's holding and found that the syndication contract precluded the syndicator from receiving any cable royalties.

This Note argues that the D.C. Circuit correctly held that the syndication contract determines the cable royalty owner. Unlike the court's holding, however, this Note analyzes why this is the correct interpretation of the 1976 Copyright Act. The Note demonstrates that the right to cable royalties is an economic benefit attaching to a subdivision of the performance and distribution right. Thus, section 201(d) allows the producer to transfer the right to cable royalties. Finally, this Note provides a framework for analyzing and drafting contracts to ensure that the appropriate party receives the cable royalties.

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